IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 338

AAA MOTOR LINES, INC., a Corporation,
Petitioner,

vs.

ALABAMA PUBLIC SERVICE COMMISSION, P. C. WHITE TRUCK LINE, INC., a Corporation, and JAMES R. CATON, d/b a CATON TRANSFER COMPANY,
Respondents.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari.

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Respondents.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari.

THIS CASE RAISES NO JURISDICTIONAL QUESTIONS REVIEWABLE UNDER 28 U. S. C., § 1257 (3).

As hereinafter noted, there is no right, privilege, or immunity here involved or claimed under the Constitution or Statutes of the United States which could conceivably confer jurisdiction under 28 U. S. C., § 1257 (3).

QUESTIONS INVOLVED.

At the outset it should be noted and remembered that no issue of or relating to interstate commerce is here involved. This action simply involves an application filed with the State Regulatory Commission by an intrastate motor carrier to extend its intrastate certificate and a judicial construction by the State Courts of the Order of the State Commission issued on that application. The basic questions involved are:

(1) Is a substantial federal question presented in a declaratory judgment proceeding instituted in the state courts to construe an order of the Alabama Public Service Commission?

(2) Will the Supreme Court of the United States undertake to review proceedings in the State Court which involve merely the construction of an order of the Alabama Public Service Commission involving an intrastate motor carrier certificate?

(3) Will the United States Supreme Court grant certiorari to review the decision of the Supreme Court of Alabama in a declaratory judgment proceeding to construe an order of the Alabama Public Service Commission, granting, in part, and denying, in part, an application for an intrastate certificate of public convenience and necessity?

(4) Will this court grant certiorari to review a decision of the Alabama Supreme Court where the petitioner had the right to and did file an application for rehearing to that court and did not raise or suggest in that application for rehearing the federal questions here sought to be presented for the first time in its petition for certiorari?

STATUTES INVOLVED

The statutes actually involved and determinative of this proceeding are the following:

Article 3, Chapter 3, Title 48, 1940 Code of Alabama, as amended (hereinafter at times referred to as "the motor carrier act") which grants to the Alabama Public Service Commission (hereinafter at times referred to as "the Commission" or "APSC") regulatory powers over intrastate motor carriers in Alabama, and in particular, Title 48, 301 (8), Alabama Code 1940, as amended, which provides in pertinent part that:

> "No common carrier by motor vehicle subject to the provisions of this act shall engage in intrastate commerce on any highway in this state unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission pursuant to the provisions of this article, authorizing such operation."

Also, the provisions of Title 48, 301 (5) (9), Alabama Code 1940, as amended, which provides in pertinent part that:

> "After a decision, order, or requirement has been made by the Commission in any proceeding under this article any party thereto may make application to the Commission for reconsideration or rehearing of the same—Such application shall be filed within thirty days after the date of such decision, order, or requirement—If, after such reconsideration or rehearing, it shall appear that the original decision, order, or requirement is in any respect unjust, or unreasonable, the Commission may reverse, change, or modify the same accordingly."

And Rule 34 of the Alabama Supreme Court (Appendix, Title 7, Code of Alabama 1940) which provides in pertinent part that:

> "All applications for rehearing must be filed with the Clerk of the Court, accompanied by brief for the applicant and a certificate of counsel within 15 days after the rendition of the judgment . . ."

STATEMENT OF THE CASE.

The facts here involved are relatively simple. The petitioner AAA Motor Lines, Inc. (hereinafter at times referred to as "petitioner" or "AAA") filed an application with the APSC under § 8 of the Alabama Motor Carrier Act (Title 48, § 301 (8), Alabama Code of 1940, as amended) to extend its Alabama intrastate certificate to serve an area in South Alabama in the transportation of intrastate freight. The application was opposed by the respondent motor carriers and four other carriers already serving the territory and performing the service for which the new authority was sought. After hearing, the Commission entered its order of January 7, 1957 (Appendix C, Petitioner's Brief, pp. 45-46) and amending AAA's certificate:

> "to include, in addition to the authority now contained therein, authority to operate as a common carrier of general commodities over regular routes as follows . . ."

Admittedly within the time and in the form and manner provided by statute [Title 48, § 301 (5) (9), Alabama Code 1940, as amended] the protestant motor carriers filed an application to the Commission for reconsideration or rehearing of its order of January 7, 1957, to which AAA replied. After proper notice the application for reconsideration or rehearing was argued orally before the Commission and on April 23, 1957, the Commission issued its

"report and order upon reconsideration and rehearing" (Appendix D, petitioner's brief, pp. 47-49), which prohibited AAA from "tacking" the authority granted in its order of January 7, 1957, with authority previously held and thus providing a service never contemplated by the Commission and for which there was **no** testimony in the record.[1] It is important, and we respectfully submit controlling to note that no appeal was taken from the order of the APSC as is specifically authorized and provided in Title 48, §§ 79 and 301 (27), Alabama Code of 1940, as amended.

Long after the time for appeal had expired and on June 18, 1957, AAA filed a bill for declaratory judgment in the Circuit Court of Montgomery County, Alabama, alleging that the restriction incorporated in the April 23, 1957, order was "unwarranted, unlawful, illegal, arbitrary and capricious" and praying that the Circuit Court issue it an intrastate certificate of public convenience and necessity without limitation or restriction.

Apparently recognizing that the position it asserted in the Circuit Court was legally untenable, and while the petition for declaratory judgment was pending, AAA filed another separate application before the APSC seeking the identical rights involved in the original application.

Following hearing on the petition for declaratory judgment, the Circuit Court of Montgomery County proceeded to engage in legislative action and to issue to AAA a certificate of public convenience and necessity in an unprece-

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[1] The Alabama Commission and the Alabama Supreme Court previously had occasion to consider the effect of "tacking" separate grants of unrestricted authority which frequently is prohibited by specific restriction and which is never legally permitted unless the essential transportation requirements are present. See *Deaton Truck Line, Inc., v. Birmingham-Tuscaloosa-M F L.*, 264 Ala. 345, 87 So. 2d 421.

dented, erroneous decision which far exceeded the imaginable bounds of a declaratory judgment proceeding (Petitioner's brief, Appendix B, pp. 38-44). Contrary to the argument of petitioner (Their brief, pp. 8-9) and as noted and held by the Alabama Supreme Court, the Montgomery County Circuit Court had before it for construction and determination both orders of the APSC—the original order of January 7, 1957, and the order on reconsideration of April 27, 1957. The Montgomery County Circuit Court held that "the present and future public convenience and necessity required that the requested extension of rights be granted."

The Commission and the motor carrier protestants appealed the decree of the Montgomery County Circuit Court to the Alabama Supreme Court (R. 500, 501), where all issues involved were exhaustively briefed and argued orally. Here again the petitioner is in error in stating or suggesting that "all the parties agreed that AAA had some right". The protestant motor carriers have never conceded that there was one word of testimony in the record which would authorize any grant of authority to the petitioner. In its decision (Appendix A, Petitioner's brief, pp. 21-37) the Alabama Supreme Court noted that "the question here is simply one of construction of the orders" and that "the real question is whether the Circuit Court correctly set aside part of the order and left part of the order in effect". The Alabama Supreme Court concluded and held that (Petitioner's brief, p. 35):

> "If the restriction here imposed in April be eliminated, the final order of the Commission will grant to AAA an unrestricted authority to operate between points authorized to be served prior to January and points named in the January order. The Commission has not granted such unrestricted operating authority, and we cannot find from the order that the Commis-

> sion intended to grant it. As a result, the April restriction cannot be rejected without causing the remainder of the order to grant authority the Commission never intended to grant. Consequently the entire order must fall."

Following the decision of the Alabama Supreme Court on March 23, 1961, and pursuant to Rule 34, AAA filed an application with the Alabama Supreme Court for rehearing or reconsideration of its decision. The petition did not raise or suggest to the Alabama Supreme Court the constitutional or federal questions here sought to be presented to this Court for the first time, although the Petitioner had the opportunity to do so in its application for rehearing, if, in fact, any such questions existed. The petitioner's application for rehearing was denied by the Alabama Supreme Court on June 2, 1961.

Again, it should be noted that the Petitioner had the right to but did not appeal the order of the APSC. Instead, it filed a petition for declaratory judgment in the Circuit Court seeking a judicial construction of the orders of the APSC. The Alabama Supreme Court exercised the only jurisdiction invoked by the Petitioner, i. e., it proceeded to a construction of the orders of the APSC involved.

Petitioner's repeated argument that "the only thing before the trial court was a construction of the April 23 order" is wholly inaccurate. As expressed and noted by the Alabama Supreme Court:

> "The January order and the [illegible] order together constitute one order of the Co[illegible]n.
>
> "The final order of April em[illegible]odies the order of January as modified, and is one order, analogous to the judgment or decree of a court or rehearing —"

The Petitioner's suggestion that (their brief, p. 11):

> "This decision left Petitioner and the public at large shipping inter-state goods with no remedy, no tribunal, and no procedure to protect their undisputed right of intra-town service."

is also incorrect. In the first place, no inter-state service was or could be involved. The Alabama Commission had no authority to grant any certificate to transport interstate freight, the jurisdiction of which is exclusively confined by Congress in the Interstate Commerce Commission (See 49 U. S. C., §303c).

The Petitioner again is in error when it suggests that it raised questions regarding the decision of the Alabama Supreme Court "at the earliest possible time" (their brief, p. 12). They neglected to note and inform this Court that Rule 34 of the Alabama Supreme Court provides for applications for rehearing and that Petitioner availed itself of this rule, but in its application Petitioner did not mention or suggest the constitutional or federal questions here sought to be raised for the first time.

REASONS FOR DENYING THE WRIT.

The Petitioner states that it relies upon **Saunders v. Shaw**, 244 U. S. 317, as justification for its presentation of the constitutional or federal questions here urged for the first time, but that case does not support Petitioner's position. In the first place no federal question is involved in this proceeding. As noted, this is a declaratory judgment action instituted by the Petitioner for the purpose of construing an order of a State regulatory commission granting, in part, and denying, in part, an application for an intrastate certificate of public convenience and necessity, after the Petitioner had failed to appeal from the

order of the Commission, and thus bring up for review the sufficiency of the evidence before the Commission on which the order was based (See Title 48, § 82, Alabama Code 1940, as amended). Had the Petitioner availed itself of its statutory right of appeal (§ 79)[2] the entire record before the Alabama Commission would have been certified (§ 83) to the Circuit Court which would consider the case on the record and set aside the order of the Commission if the Court found that (§ 82):

> ". . . the Commission erred to the prejudice of the Appellant's substantial rights in its application of the law; or, the order . . . was based upon a finding of facts contrary to the substantial weight of the evidence."

Having failed or neglected to appeal the Petitioner sought a construction of the certificate in declaratory judgment proceedings authorized by Title 7, § 157, Alabama Code 1940.

It is apparent that no federal question is here involved. Assuming, arguendo, that a federal question is involved (which Respondents deny) then it was not raised before or presented to the Alabama Supreme Court by petitioner. It is fundamental that before this Court will grant certiorari to review a decision of the State Supreme Court it must affirmatively appear that a federal question exists and that it was presented to the State Supreme Court and that its decision of the federal question was necessary to its determination of the cause. None of those requirements are here present. The general rule was stated by this Court in **Durley v. Mayo**, 351 U. S. 277, cert. den. 352 U. S. 859, as follows:

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[2] Unless otherwise indicated all Section references in this brief will refer to Sections of Title 48, Alabama Code 1940, as amended, unless otherwise specifically indicated.

> "It is a well established principle of this Court that before we will review a decision of a State Court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to determination of the cause. **Honeyman v. Hanan**, 300 U. S. 14, 18; **Lynch v. New York**, 293 U. S. 52, and where the decision of the State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, the Court will not undertake to review it."

Following the decision of the Alabama Supreme Court here complained of the Petitioner filed a petition for reconsideration with that Court but did not raise or suggest any Federal questions in that petition. As noted, the petition was overruled by the Alabama Supreme Court on June 22, 1961.

The principle or rationale of **Saunders v. Shaw**, 244 U. S. 317, is not here involved since the Petitioner did not raise or suggest any federal question in its petition for reconsideration to the Alabama Supreme Court.

In **New York Ex Rel. Consolidated Water Company v. Maltbie**, 303 U. S. 158, the Petitioner sought to review the action of the State Court affirming an order of the State Public Service Commission ordering the utility to file a schedule of rates to reduce its annual operating revenues. This Court noted that:

> "Upon the review of the Commission's orders by certiorari, only questions of law were open under the State practice, including the question whether there was evidence to sustain the findings of the Commission. In that view no substantial federal question is presented."

Here the only question involved or presented to the Alabama Courts as specifically noted was "whether the order of the (Alabama) Commission is ambiguous."

The Alabama Supreme Court rendered no formal opinion in overruling Petitioner's application for rehearing. As noted in **Durley v. Mayo**, 351 U. S. 277, cert. den. 352 U. S. 859:

> "Where the highest Court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this Court will not take jurisdiction to review the *judgment*."

Thus, in the case here pending:

There is no federal question involved that could conceivably confer jurisdiction under 28 U. S. C. 1257 (3).

No federal question was presented or suggested to the Supreme Court of Alabama although the Petitioner had the opportunity to do so in its application for rehearing.

A decision on no federal question was necessary or pertinent to a proper determination of the declaratory judgment proceedings by the Alabama Supreme Court.

It affirmatively appears that the decision of the Alabama Supreme Court was on a State ground and that it properly construed the orders of APSC involved.

The Petitioner failed to note that in **Nat. Assoc. for the A. C. P. v. Alabama**, 357 U. S. 449, the petitioner raised Constitutional questions at the inception and insisted upon same throughout the proceedings in the State Court.

(a) **The Procedural Questions.**

As correctly noted by the Alabama Supreme Court the question involved in the declaratory judgment proceedings initiated by Petitioner "is simply one of construction of the orders." Neither the Circuit nor the Supreme Court of Alabama could properly engage in legislative action and issue a certificate. The Alabama Supreme Court recognized that "an action for declaratory judgment cannot be made a substitute for appeal." **Mitchell v. Hammond**, 252 Ala. 81, 39 So. 2d 582; **Howle v. Alabama State Milk Control Board**, 265 Ala. 189, 90 So. 2d 752, and noted that

> "The relief here sought was not a review of the propriety of the order of the Commission as such propriety might be determined on an appeal. The question is whether the order of the Commission is ambiguous."

Admittedly, and of necessity, the entire order of the Commission was before the Court for construction. The same procedure is open to the Petitioner now as would have been open had the Supreme Court ruled invalid only the April 23 order of the Commission. The Alabama Supreme Court earlier pointed out the procedure in **Smith Transfer Company v. Robins Transfer Company**, 253 Ala. 406, 63 So. 2d 351, which was also a declaratory judgment action to construe an order of the Commission. The Alabama Supreme Court there declared:

> "The power lies with the Alabama Public Service Commission to make its orders clearly reflect the intention of the Commission, and it is to that body that resort should be had for the amendment or change of its certificate of convenience and necessity and not to the courts".

As previously noted, the Petitioner apparently recognizing its legally untenable position already has filed an

application with the APSC identical with its original application. Any action of the Alabama Commission on the new application of the Petitioner (as was the order on the original) is appealable under Title 48, § 79, 301 (27) (Alabama Code 1940 as amended).

(b) No Property Rights of Petitioner Have Been Affected.

The Alabama Supreme Court rendered the only decision legally sound and possible under the facts. It held that the April order "embraced the order of January" and, as modified, was "one order", and that if the April 23rd order was void, as argued by the Petitioner, then the entire order was void.

The controlling case on the question presented to the Alabama Circuit and Supreme Court was **Wilkinson v. Stiles**, 200 Ala. 279, 76 So. 455, where the Alabama Supreme Court early adopted the general rule and declared that:

> "It is the general rule of statutory construction that if by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."

In 1 Lewis, **Southerland Statutory Construction** (2d Ed.), § 306, p. 597, it is declared that:

> "If, by striking out a void exception, proviso, or other restrictive clause, the remainder, by reason of its generality, will have a broader scope as to subject or territory, its operation is not in accord with the legislative intent, and the whole would be affected and made void by the invalidity of such part."

The proposition that a certificate of public convenience and necessity cannot be disapproved in part follows the general rule of statutory construction, as expressed in 59 **C. J.**, § 206, p. 646, as follows:

> ". . . where by striking out a void exception, proviso, or other restrictive clause, the remainder will have a broader scope than intended, the whole act is void."

Obviously, if the restriction in the certificate was stricken, then the scope of the certificate would become much broader than intended by the Commission.

A case almost, if not identical to the one presented to the Alabama Supreme Court is **Transcontinental Bus System, Inc. v. State Corporation Comm.**, 56 N. M. 158, 241 P. 2d 829. There, Transcontinental filed an action against the State Corporation Commission to vacate an order granting a certificate. The Supreme Court of New Mexico held that the trial court, on appeal, having determined that the order of the Commission was only lawful in part, was not authorized to amend the order and could only set it aside. Thus, in the **Transcontinental** case, the trial court, on appeal, held that a part of the order of the Commission was unjustified. The Supreme Court held that the trial court could not set aside a part of the order, but had to set aside the entire order, and that to set aside a part thereof and to affirm or order the balance of the certificate to be issued would be to engage in legislative and not judicial functions. In language particularly apropos, the court there declared:

> "To permit the court to amend or modify an order of an administrative agency is repugnant to the fundamental law providing for separation of powers of executive, legislative and judicial departments of our government. The administrative board or tribunal

acts in a legislative capacity and the trial court acts in a judicial capacity. To allow a court to amend or modify an order of our State Corporation Commission amounts to a substitution of the judgment of the court for that of the Commission and the court, in such a case, would be acting legislatively and not judicially."

In **Harris v. State Corp. Comm.**, 129 P. 2d 323, 327, The Supreme Court of New Mexico, in considering a motor carrier act similar to the Alabama Act declared:

"When our legislature enacted C. H. 154, L. 1933, it declared its purpose and policy to confer upon the Commission the power and authority to make it its duty to supervise and regulate the transportation of persons and property by motor vehicle for hire upon the public highways of this State and to relieve the undue burdens on the highways and to protect the safety and welfare of the traveling and shipping public and to preserve, foster and regulate transportation, and permit the co-ordination of transportation facilities."

"Manifestly, **this is a legislative and or administrative, and not a function of the judiciary**." (Emphasis supplied.)

The rule was also well expressed and applied in **Ill. Comm. Comm. v. N. Y. Cent. Ry. Co.**, 398 Ill. 11, 75 N. E. 2d 411, 415, where it is stated:

"The court, in reviewing an order of the Commerce Commission, must either confirm or set aside the order as a whole; and where the court reverses the order because a part of the same is invalid, it need not consider the validity of any other part of the order, since the invalidity of a part renders the entire order void."

Likewise, in **Gulf Transport Co. v. Ill. Comm. Comm.**, 402 Ill. 11, 83 N. E. 2d 336, the same rule was announced as follows:

> "**The court on review must either confirm or set aside the order as a whole, since the invalidity of a part renders the entire order void.**" (Emphasis supplied.)"

This rule is followed in numerous other decisions, such as **State ex rel. Anderson v. Public Service Commission**, 234 Mo. App. 470, 134 S. W. 1069; **State ex rel. Interstate Transit Lines v. Public Service Comm.**, 237 Mo. App. 554, 132 S. W. 2d 1082; **State ex rel. Mo. Pac. R. Co. v. P. S. C.**, 37 S. W. 2d 576; **Railway Express Agency v. Public Serv. Comm.**, 237 Mo. App. 420, 169 S. W. 2d 88.

(c) The Commerce Clause of the United States Constitution (Art. 1, § 8, Cl. 3) Is Not and Could Not Be Involved in an Intrastate Certificate.

The APSC has no jurisdiction over any shipments moving in interstate commerce. In arguing that the Commerce Clause of the Federal Constitution is or could be here involved the Petitioner is as confused as a gypsy who sings at the funeral and cries at the birth of a friend.

Any certificates issued by the APSC necessarily are restricted to intrastate shipments. In order to transport freight in interstate commerce a motor carrier for hire must obtain a certificate from the Interstate Commerce Commission under 49 U. S. C., Section 306, except that an intrastate carrier can file an application for registration under applicable regulations of the Interstate Commerce Commission and the Second Proviso of 49 U. S. C., Section 306 (a) (1). No evidence was introduced and none could have legally been received in any of the proceedings before

the Alabama Commission relating to the movement of interstate freight. Section 8 of the Alabama Motor Carrier Act [Title 48, Section 301 (8), Alabama Code 1940, as amended] empowers the Commission to issue certificates authorizing the transportation of intrastate freight. Part II of the Interstate Commerce Act provides (49 U. S. C., 306) that:

> "No common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the [Interstate Commerce] Commission authorizing such operations." (Parenthetical added.)

CONCLUSION.

The respondents respectfully submit that:

—There is no Federal question here involved which could possibly justify jurisdiction and review of the decision of the Alabama Supreme Court under 28 U. S. C., Section 1257 (3).

No Federal question was presented to the Alabama Supreme Court although the Petitioner had the opportunity to do so in the application for rehearing of any such question was involved.

—No decision on any Federal question was necessary by the Alabama Supreme Court in the determination of this cause which simply involved the construction of an order of the APSC relating to an intrastate certificate.

—An intrastate certificate does not and cannot authorize transportation of goods in inter-state commerce without

compliance with Part II of the Interstate Commerce Act by the carrier.

This Court will not grant certiorari where it affirmatively appears that the decision of the State Court rested upon a non Federal ground.

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Certificate of Service

State of Missouri,
St. Louis.

I, J. Guy Hood, being first duly sworn on oath, says that he is President and Treasurer of St. Louis Law Printing Co., Inc., and that he has served a copy of the foregoing Reply to Petition for Certiorari upon the attorneys for Petitioner, Goldbold, Hobbs & Copeland, by depositing a copy thereof in a United States Post Office with first class postage prepaid addressed to them at 330 Professional Building, Montgomery, Alabama, on the 18th day of September, 1961.

Subscribed and sworn to before me this 18th day of September, 1961.

(Seal) .....
Notary Public.

This act is performed in the City of St. Louis which adjoins St. Louis County, and for which I am commissioned.